

Winning and Losing under the Americans with Disabilities Act

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This article—a sequel to Professor Colker's article, The Americans with Disabilities Act: A Windfall for Defendants—analyzes appellate employment discrimination decisions in ADA cases that are available on Westlaw. She compares ADA judicial outcomes to those under other statutes, and suggests that ADA outcomes are more pro-defendant than outcomes under other civil rights statutes. She entertains and rejects one hypothesis for this result—that the ADA is a new statute experiencing an early period of judicial uncertainty. Having determined that judicial uncertainty has not been a factor in predicting ADA appellate outcomes, she uses a logistic regression analysis to determine what factors do predict ADA appellate outcomes. She concludes that the most important predictors of success by plaintiffs appear to be EEOC participation, being represented by counsel, and the circuit in which the plaintiff litigated. She found a modest trend toward certain types of disabilities associating with positive outcomes but predicts that those results are likely to disappear, or even reverse, in light of intervening Supreme Court decisions. Surprisingly, she did not find that the theory of disability or whether a plaintiff requested an accommodation was a significant factor in predicting appellate outcome.

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In a previous article, I described the Americans with Disabilities Act¹ as a “windfall” for defendants, based on the observation that defendants prevail in more than ninety-three percent of reported ADA employment discrimination cases decided on the merits at the trial court level, and in eighty-four percent of cases that are appealed and available on Westlaw.² These conclusions, and similar conclusions by the American Bar Association,³ drew widespread attention from the media, because they were counter to prior media portrayals of the ADA as creating a “lifelong buffet of perks, special breaks and procedural protections” for people with questionable disabilities.⁴

My prior research focused on judicial outcomes in the employment discrimination cases reported in Westlaw at the trial court and appellate levels. Although the conclusions reflected an accurate description of the basic judicial outcome data, they were not based on a close examination of these cases through, for example, consideration of the types of claims of discrimination that were brought, the categories of disabilities of the named plaintiffs, or other factors. On the ADA’s tenth anniversary, I am investigating the judicial outcome data for the employment discrimination cases through a sharper lens by working with a more detailed database.

The ADA has a broad scope. It comprises three major titles—employment (Title I),⁵ public entities (Title II),⁶ and public accommodations (Title III).⁷ Although ADA enforcement can be credited with improvements in the accessibility of public accommodations,⁸ and increased services by public entities for individuals with

¹ 42 U.S.C. §§ 12101–213 (1994 & Supp. III 1997).

² Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. REV. 99, 100 (1999) [hereinafter Colker, *Windfall*].

³ See American Bar Association, *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 403, 404 (1998).

⁴ See, e.g., Ruth Shalit, *Defining Disability Down: Why Johnny Can’t Read, Write, or Sit Still*, NEW REPUBLIC, Aug. 25, 1997, at 16.

⁵ Title I provides: “No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” 42 U.S.C. § 12112(a) (1994).

⁶ Title II provides: “Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132 (1994).

⁷ Title III provides: “No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.” 42 U.S.C. § 12182(a) (1994).

⁸ See Ruth Colker, *ADA Title III: A Fragile Compromise*, 21 BERKELEY J. EMP. & LAB. L. 377 (2000) [hereinafter Colker, *Fragile Compromise*].

disabilities,⁹ most of the reported litigation has involved issues of employment discrimination.¹⁰

Employment discrimination claims can be brought against both private and public entities under ADA Title I, although public entities are also covered under ADA Title II. ADA Title II employment discrimination cases incorporate the legal standards of ADA Title I.¹¹ Thus, in assessing judicial outcomes, there is no reason to distinguish between employment discrimination cases brought against public and private actors.¹²

ADA employment discrimination litigation is patterned on Title VII of the Civil Rights Act of 1964 (CRA Title VII)¹³ and section 504 of the Rehabilitation Act of 1973 (section 504).¹⁴ Like CRA Title VII, ADA Title I requires claimants first to file a claim of discrimination with the Equal Employment Opportunity Commission.¹⁵ ADA Title I provides relief comparable to the relief provided under CRA Title VII for claims of disparate treatment and disparate impact discrimination. Moreover, the compensatory damages scheme embodied in the Civil Rights Act of 1991 applies to the ADA (with some exceptions).¹⁶

Because it borrows from section 504 and its regulations, the ADA also has some marked differences from CRA Title VII. People can only bring suit under the ADA if they meet the definition of an "individual with a disability" that was previously

⁹ See, e.g., *Olmstead v. L.C.*, 527 U.S. 581 (1999) (holding that states are required to provide community-based treatment for person with mental disabilities).

¹⁰ See Colker, *Windfall*, *supra* note 2, at 99 (1999).

¹¹ See 28 C.F.R. § 35.140(b)(1) (1999) ("For purposes of this part, the requirements of title I of the Act, as established by the regulations of the Equal Employment Opportunity Commission in 29 CFR part 1630, apply to employment in any service, program, or activity conducted by a public entity if that public entity is also subject to the jurisdiction of title I.").

¹² Some ADA Title II cases do involve the question of sovereign immunity—whether Congress exceeded its authority in creating a private cause of action for monetary damages against state actors. Because that is a constitutional issue, rather than an issue of statutory interpretation, I did not include cases which were resolved on that basis in the database. Thus, the cases brought against public and private employers involved identical issues of statutory interpretation. I did code for whether the defendant was public or private and found that variable was not significant in predicting appellate outcome.

¹³ 42 U.S.C. §§ 2000e-1–2000e-17 (1994 & Supp. III 1997).

¹⁴ 29 U.S.C. §§ 701–797 (1994 & Supp. IV 1998). Disability discrimination claims can also be brought under sections 501 and 503 of the Rehabilitation Act. Because section 504 has the broadest coverage (covering all entities receiving "federal financial assistance"), I will typically refer to "section 504" as a shorthand for all Rehabilitation Act disability discrimination cases.

¹⁵ See 42 U.S.C. § 12117 (enforcement).

¹⁶ See Civil Rights Act of 1991, 42 U.S.C. § 1981a(a)(3) (1994 & Supp. III 1997) (providing that compensatory damages may not be awarded under the ADA when the covered entity has demonstrated "good faith" in seeking to identify a reasonable accommodation).

codified in section 504.¹⁷ Moreover, they are entitled to “reasonable accommodations” so long as those accommodations do not pose an “undue hardship” to the employer.¹⁸ Employers are also allowed to offer some unique defenses such as that the individual with a disability poses a “direct threat” to the health or safety of others.¹⁹

Part I of this article describes my database design. In Part II, I set forth how ADA judicial outcomes compare to judicial outcomes under other statutes, including Title VII. My research suggests that the appellate litigation outcomes under the ADA are more pro-defendant than under other civil rights statutes.²⁰ I do not want to overstate my observation: to fully know how ADA litigation compares to litigation in other fields, one would need access to settlement and verdict data, as well as trial court data. My data are limited to appellate outcomes available on Westlaw. But because appellate decisions have an important influence on the development of precedent in a circuit, and are usually the data source most available to practitioners and the media, this conclusion is important.

In Part III, I consider one hypothesis for why ADA appellate outcomes may be more pro-defendant than under other statutes—that the ADA is a new statute, experiencing an early period of judicial uncertainty. With the passage of time, one might expect these results to even out, so that plaintiffs would be pursuing on appeal only those cases that have a reasonable chance of success.

My results—which will be described more fully in Part III—do not lend support to the judicial uncertainty notion, because appellate judicial outcomes have remained relatively constant since 1994. Having determined that judicial uncertainty has not been a factor in predicting ADA appellate outcomes, in Part IV I investigate what factors best predict successful (or losing) ADA appellate employment discrimination cases. First, I will ask whether the distinctive textual aspects of ADA cases, such as the concepts of disability or reasonable accommodation, associate with pro-defendant outcomes. Second, I will discuss what other factors were found to predict pro-plaintiff or pro-defendant outcomes. My overall conclusion is that the unique features of the

¹⁷ The three-part definition of a person with a disability dates back to 1974. When Congress originally passed section 504, it used a more narrow definition of the term “handicapped individual,” which was limited to concerns with a person’s employability. *See* Rehabilitation Act of 1973, Pub. L. No. 93-112, § 7(6), 87 Stat. 355, 361 (1973). When the Act was amended in 1974, Congress amended the definition of “handicapped individual” to include the three prongs that have remained the basis of section 504 ever since. *See* Rehabilitation Act Amendments of 1974, Pub. L. No. 93-516, § 111(a), 88 Stat. 1617, 1619 (1974). The ADA simply substituted the words “disability” for the words “handicapped individual.” Section 504 was subsequently amended so that it also uses the word “disability” rather than “handicapped.” *See* Rehabilitation Act Amendments of 1998, Pub. L. No. 105-220, § 403, 112 Stat. 936, 1101 (1998).

¹⁸ *See* 42 U.S.C. § 12111(10) (defining “undue hardship”).

¹⁹ *See* 42 U.S.C. § 12111(3) (defining “direct threat”).

²⁰ *See generally*, Colker, *Windfall*, *supra* note 2, at 99 (1999).

statute do not explain the strong pro-defendant record of the appellate courts. The most important predictor of success by plaintiffs appears to be EEOC participation, being represented by counsel, and the circuit in which plaintiff litigated. There was a modest trend towards certain types of disabilities associating with positive outcomes but these results are likely to disappear, or even reverse, in light of intervening Supreme Court decisions. Demotion claims also appear to achieve more favorable results than other theories of discrimination but these results are based on a sample of nineteen cases and may disappear over time.

These are results from early years of a new statute. It will be interesting over time to see if plaintiffs respond to this overwhelming pro-defendant record of appellate judicial outcomes by appealing fewer pro-defendant outcomes.²¹ My comparative Title VII data suggests that enormous changes over time have occurred in judicial outcomes under that statute. Appellate judicial outcomes in the first seven years were decidedly pro-plaintiff; today, they are decidedly pro-defendant. Appellate judicial outcome data, therefore, would appear to be able to fluctuate considerably over time. Hence, this early snapshot of ADA appellate employment discrimination litigation is only the beginning of a long-term assessment of ADA appellate outcomes.

²¹ A recent Supreme Court decision under the Age Discrimination in Employment Act, however, may cause plaintiff lawyers to appeal more adverse summary judgment decisions. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 120 S.Ct. 2097 (2000) (concluding that the court of appeals impermissibly substituted its judgment concerning the weight of the evidence for the jury's). In my previous empirical article on the ADA, I concluded that overuse of the summary judgment device by district courts and courts of appeals had resulted in markedly pro-defendant outcomes under the ADA. Colker, *Windfall*, *supra* note 2, at 101. The *Reeves* decision may help halt the overuse of the summary judgment standard if Justice Ginsburg's prediction in her concurring opinion proves to be correct. Justice Ginsburg observed:

As the Court notes, it is a principle of evidence law that the jury is entitled to treat a party's dishonesty about a material fact as evidence of culpability. *Ante*, at 2108, 12. Under this commonsense principle, evidence suggesting that a defendant accused of illegal discrimination has chosen to give a false explanation for its actions gives rise to a rational inference that the defendant could be masking its actual, illegal motivation. *Ibid*. Whether the defendant was in fact motivated by discrimination is of course for the finder of fact to decide; that is the lesson of *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993). But the inference remains—unless it is conclusively demonstrated, by evidence the district court is required to credit on a motion for judgment as a matter of law, see *ante*, at 2110–2111, that discrimination could not have been the defendant's true motivation. *If such conclusive demonstrations are (as I suspect) atypical, it follows that the ultimate question of liability ordinarily should not be taken from the jury once the plaintiff has introduced the two categories of evidence described above.*

Reeves, 120 S. Ct. at 2112 (emphasis added).

I. THE DATABASE

My research method is to read and code appellate ADA employment discrimination decisions²² that are available on Westlaw.²³ These appellate opinions are nonrepresentative of all judicial opinions in two important respects: (1) they are appellate opinions and (2) they are opinions that are available to the public. These factors require special caution in research of this kind.

Appellate opinions tend to involve appeals of various pre-trial motions, such as dismissals or summary judgments that hinge on issues of “pure law.” Parties can only appeal final judgments, so a denial of a request for summary judgment is rarely appealed. Appellate opinions do not tend to involve appeals of verdicts, because such outcomes are often heavily fact-based. And, of course, they rarely involve appeals of settlements. It is commonly estimated that most cases settle so appellate decisions do not give us information on the most common type of case.²⁴ Further, they rarely

²² I excluded three kinds of cases which satisfied these criteria. First, I excluded cases involving the question of whether arbitration should take place, because the decisions in those cases did not involve any ADA-specific issues. Plaintiffs often prevailed on the question of whether arbitration could be required in these cases on appeal. Including them in my database would give me a skewed sense of what characteristics caused plaintiffs to prevail on appeal. Second, I excluded cases that were patently frivolous because they sued non-covered defendants or were clearly brought outside the statute of limitations. These cases were usually brought pro se and offered little substantive explanation of the operation of the ADA, since they raised no genuine issues for litigation. Third, I excluded cases that were resolved solely on non-ADA issues such as evidence questions, constitutional issues, or attorney fees. Although I did hire students to assist me in coding the cases, I personally made every decision to exclude a case from the database. I also checked or coded every case in the database.

²³ I found these decisions by using the search term “Americans with Disabilities Act” in the U.S. Court of Appeals (CTA) database on Westlaw. This search provided a list of cases which was overinclusive, because it included nonemployment cases and non-ADA cases that mentioned the ADA. These extra cases were eliminated from the database. I included cases irrespective of whether they were actually “published” in the federal reporter system. Although there may be some ADA cases missed by this search method, due to human error or a failure by an appellate court to refer to the “Americans with Disabilities Act,” I suspect they are very few.

²⁴ The category of settlement is particularly complex under the ADA, because the statute requires all complaining parties to file a charge of discrimination with the EEOC (or a state Fair Employment office) before receiving a right to sue letter. Of the charges filed with the EEOC through September 30, 2000, 5.5% resulted in settlements, 5.0% resulted in withdrawals with benefits, and 1.8% resulted in successful conciliations. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, *Americans with Disabilities Act of 1990 (ADA) Charges FY 1992–FY 2000*, <http://www.eeoc.gov/stats/ada-charges.html> (last modified Jan. 18, 2001). Thus, 12.3% of all claims resulted in a pre-trial resolution that was favorable to the plaintiff. In addition, the EEOC found reasonable cause to believe that discrimination had occurred in an additional 3.5% of the cases, but was not able to obtain a successful conciliation. Of the 87.7% of the claims in which a voluntary resolution is not achieved, there is no way to know what percentage of these

provide information on the verdicts that may have been rendered. Thus, in my database of 720 appellate cases, I found that only 60 cases (8.3%) were appeals of verdicts. Of these 60 cases, only 37 constituted pro-plaintiff verdicts.²⁵ Although these 37 cases represented only 5.1% of the cases in my database, it is wrong to conclude from this fact that plaintiffs obtain favorable verdicts in 5.1% of all ADA cases. Because of the legal barriers to appeals of factual determinations, it would be foolish for plaintiffs or defendants to appeal most adverse verdicts. My database cannot precisely answer the question of what percentage of ADA cases result in favorable verdicts.²⁶ It can tell us only how the appellate system handles those verdicts on appeal.

Opinions available on Westlaw are also not reflective of all appellate opinions. There has been extensive discussion elsewhere of the differing publication practices among the circuits.²⁷ By conducting my research on Westlaw, I avoided some of those problems but not all of them. I was able to include all decisions made available by the courts rather than limiting myself to opinions made available through the federal reporter system. Nonetheless, as I reported in a previous article, circuits are inconsistent in the extent to which they allow nonpublished opinions to be made available to Westlaw.²⁸ The variation in the number of cases found for each circuit may be reflective of differing publication practices rather than the actual number of decisions rendered in those circuits.²⁹

cases resulted in litigation and, if so, what percentage resulted in pre-trial settlements. The EEOC does not track the cases once a right-to-sue letter has been issued. Of the more than 141,000 cases that could have resulted in a claim of discrimination filed in a court of law, only 720 (0.63%) are reported in my database.

²⁵ See Table 2, *infra* p. 249.

²⁶ Lexis does have a verdict database. Westlaw used to make a verdict database available to its educational subscribers. I explore the verdicts under ADA Title III in another article. See Colker, *Fragile Compromise*, *supra* note 8. The EEOC's web site, however, reveals that 11.6% of all claims filed with the EEOC resulted in a pre-trial resolution that was favorable to the plaintiff and an additional 2.9% obtained a reasonable cause finding (without voluntary conciliation). See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *supra* note 24. Given that claimants can file with the EEOC at no expense to themselves, so that there is little incentive to avoid frivolous complaints, this figure may suggest that complaining parties have a reasonable chance of success at obtaining a favorable outcome in a pretrial context. For further discussion of these figures, see Kathryn Moss et al., *Outcomes of Employment Discrimination Charges Filed under the Americans with Disabilities Act*, 50 PSYCHIATRIC SERVICES 1028 (1999).

²⁷ See, e.g., Daniel N. Hoffman, *Nonpublication of Federal Appellate Court Opinions*, 6 JUST. SYS. J. 405 (1981); Peter Siegelman & John J. Donohue III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 L. & SOC'Y REV. 1133 (1990).

²⁸ See Colker, *Windfall*, *supra* note 2.

²⁹ For further discussion of courts' differing publication practices, see Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71 (2001).

The most important caveat that emerges from these considerations is that appellate investigations in the employment discrimination area reflect a selection bias. The largest categories of cases that are decided on appeal are dismissals and summary judgment motions. Dismissals are, by definition, a pro-defendant outcome. Although plaintiffs can theoretically attain a victory through summary judgment, that is a very rare outcome. Thus, in my database of 720 cases, 88 (12.2%) involved appeals of dismissals and 540 (75%) involved appeals of pro-defendant summary judgment decisions. By contrast, only 2 appeals involved appeals of pro-plaintiff summary judgment decisions. Again, it is wrong to conclude from this data that 87% of all ADA cases result in dismissals or pro-defendant summary judgment decisions.³⁰ But it is correct to conclude that 87% of the cases appealed and made available on Westlaw had resulted in dismissals or grants of summary judgment for defendants at the trial court level.³¹

As Professors Eisenberg and Schwab have noted, there are three potential perspectives on judicial outcomes: (1) the perspective of the law professor or student who reads published appellate opinions, (2) the perspective of an appellate judge who sees all filed appeals and decides which appellate opinions should be published, and (3) the perspective of the district court judge who sees all filings and has a ground level view of litigation.³²

When they made that observation in 1990, categories one and two were markedly different, because unpublished opinions were not generally available to the public. With the expanding publication practices of Westlaw and Lexis, the first and second perspectives have become a bit less distinct. Only 375 of the 720 cases in my appellate database reflect "published" decisions that are available in the federal reporter system. The 345 unpublished opinions do not reflect all filed or decided

³⁰ Because a final judgment is required before an appeal can be taken, "[a]n order dismissing the case is immediately appealable, but an order denying a motion to dismiss or a summary judgment would not be appealable." Marc A. Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 AM. B. FOUND. RES. J. 455, 468 (1980)[hereinafter Franklin, *Winners and Losers*].

³¹ It is interesting to note that the EEOC reports that it attained merit resolutions in 15.7% of the charged filed under the ADA from 1992 to 2000. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *supra* note 24. That 15.7% figure includes 3.5% of their cases in which they found reasonable cause to believe that discrimination had occurred but were not able to obtain a successful conciliation. If one subtracts the 3.5% figure from the 15.7% figure, one gets 12.2%. In other words, the EEOC's data shows that only 12.2% of claimants obtained a favorable result in a pre-litigation context. My data shows that only 13% of plaintiffs obtained a favorable result at the trial court level, if the case was appealed to the court of appeals and made available on Westlaw. Based on the EEOC's data, there is no reason to conclude that my 13% figure is unreflective of the actual litigation results of all plaintiffs in ADA lawsuits irrespective of whether the decision is appealed and made available on Westlaw.

³² Theodore Eisenberg & Stewart J. Schwab, *What Shapes Perceptions of the Federal Court System?*, 56 U. CHI. L. REV. 501, 503 (1989).

appeals but do broaden the perspective of the law professor or student who engages in computerized research. As of January 1, 2000, three circuits (Third, Fifth, and Eleventh) did not make their unpublished opinions available to the public. Because unpublished opinions are overwhelmingly affirmances of pro-defendant results at trial, it appears that reliance on publicly available opinions overstates plaintiffs' success rates on appeal.³³ More importantly, the practice of not making unpublished opinions available means that my database will overstate the tendency of the Third, Fifth, and Eleventh Circuits to reach pro-plaintiff results.

In any event, there is no way that someone who relies on computerized search techniques can have the perspective of the district court judge, because the majority of filings result in settlement and many decided cases do not result in opinions made available to the public. I therefore cannot claim that my research gives us much, if any, insight on the perspective of the district court judge. Because of the growing database available on Westlaw, however, it does give us a fuller picture of appellate outcomes than would reliance only on published opinions.

II. SUCCESS RATES UNDER THE ADA AND OTHER CAUSES OF ACTION

A. Definition of "Winning"

In order to compare ADA judicial outcomes to judicial outcomes under other statutes, one needs to have a definition of what it means to "win" under the relevant statutes. There are two different ways to think of the concept of "winning." First, one could say that plaintiffs have only "won" if they prevailed at trial and that decision was affirmed on appeal. Second, one could say that plaintiffs have won if their trial court victory was affirmed on appeal *or* they convinced the appellate court to reverse a pro-defendant trial court outcome. This second definition of winning is a broader definition, but it is also a bit misleading. Plaintiffs who obtain a reversal of a trial court dismissal may not ultimately prevail in litigation. They may never obtain a damages award; in fact, they may lose at the summary judgment stage after remand. Or, they may lose at trial. Nonetheless, it is true that they obtained a victory in the appellate court.³⁴ Other researchers who have obtained empirical data on appellate

³³ For further discussion, see Colker, *Windfall*, *supra* note 2, at 104–05.

³⁴ A further complication in this definition of success is that both parties sometimes appeal cases and the appellate court sometimes affirms in part and reverses or remands in part. In such cases, I personally reviewed the case to see whether it should be categorized as an affirmance or reversal. The reversal had to be "substantial" for me to include the case in the reversal category. The hardest cases to characterize were ones in which the judgment for plaintiff was affirmed but the award was reduced. I created a special category of reversal for this type of decision which I report in the various tables that I have prepared.

outcomes have used this second definition of success.³⁵ I will generally use that definition of success in this article while noting its limitations.

B. *ADA Overall Win/Loss Data*

Table 1 shows how plaintiffs and defendants fare in appellate decisions available on Westlaw in ADA employment discrimination cases. Defendants are far more likely to attain a reversal on appeal than are plaintiffs. Defendants attain a full reversal in 42% of appellate litigation and obtain a reduction in the damages award in an additional 17.5% of cases. Plaintiffs, by contrast, obtain a reversal of a pro-defendant judgment in only 12% of cases.

Table 1:
Judicial Outcome: All Cases

		Court of appeals disposition of lower court's ADA decision			Total
		affirmed	reversed	reversed in part; damages lowered	
Lower Outcome	Pro-Defendant	594 (87.5%)	81 (12%)	n/a	675 (94%)
	Pro-Plaintiff	18 (40%)	19 (42%)	8 (17.5%)	45 (6%)
Total		612	100	8	720

In order to determine if those results are statistically significant, I performed a Chi-square analysis of the differing rates of reversal for plaintiffs and defendants on appeals. Reversals were defined as including cases in which the judgment was affirmed but the award was reduced. Reversal rates for plaintiffs and defendants were highly significant ($p = 0.000$). Because the significance level is below 0.001, factors other than chance should account for the differential success rate for plaintiffs and defendants on appeal.

When Professor Franklin found a similar trend in defamation litigation, he concluded that such a differential result was surprising:

³⁵ See Eisenberg & Schwab, *supra* note 32, at 517.

Although appeals from pretrial interlocutory rulings favorable to plaintiffs might be unusual, this would not explain the disparity in rates of affirmance on the merits. Indeed, it is often speculated that trial judges generally tend to rule in favor of defendants at pretrial stages to avoid possibly needless trial and to clear calendars of doubtful cases. If that were true, one would expect a lower affirmance rate in rulings for defendants than in cases in which trial judges rule for plaintiffs.³⁶

Franklin, however, assumes that trial court judges have more of a docket-clearing motive than appellate court judges so that they would be more likely to render pro-defendant outcomes than appellate judges. An appellate court judge, however, may have the same interest in docket-clearing as a trial court judge, thereby making summary affirmances a popular device. Because summary affirmances tend to reflect affirmances of pro-defendant trial court outcomes, it may not be surprising that the pro-defendant bias in the trial courts is replicated in the appellate courts as reflected in Table 2.

Table 2:
Plaintiffs' and Defendants' Relative Success Rates on Appeal

	Defendant Success Rate	Plaintiff Success Rate
Jury Verdict	22 of 34	1 of 16 (6.25%)
Bench Trial	2 of 3	0 of 7
Preliminary Injunction	0 of 1	0 of 0
Denial of Preliminary Injunction	0 of 0	0 of 3
Final Injunction	1 of 1	0 of 0
Summary Judgment	1 of 2	61 of 540 (11.3%)
Denial of Summary Judgment	0 of 2	0 of 1
Dismissal	NA	15 of 88
Denial of Dismissal	0 of 1	NA
Judgment as a Matter of Law	1 of 1	4 of 20
Total	27 of 45 (60%)	81 of 675 (12%)

³⁶ Franklin, *Winners and Losers*, *supra* note 30, at 469–70.

One explanation for the differing success rates between plaintiffs and defendants on appeal might be that plaintiffs and defendants are appealing different kinds of decisions, and that defendants have a comparatively more lenient burden of proof. Table 2 summarizes the legal postures of plaintiffs and defendants cases on appeal and compares their relative success rates.

Plaintiffs are more likely to be appealing adverse summary judgment motions and defendants are more likely to be appealing adverse trial court decisions. One therefore might speculate that it is easier to challenge trial court verdicts than summary judgment decisions. Two factors, however, counsel against that conclusion. First, when plaintiffs challenge adverse jury decisions, they prevail at a much lower rate than defendants. So, if it is easier in general to challenge jury verdicts than summary judgment decisions then why do plaintiffs not benefit from that general principle? Also, the experience of plaintiffs was exactly the opposite of this hypothesis. They found it relatively easier to challenge summary judgment decisions than trial verdicts.

Second, the legal rules would actually appear to favor plaintiffs on appeal, not defendants, because there are significant legal barriers to challenging jury verdicts. Their findings of fact must be appealed under a clearly erroneous standard—the highest burden of proof created by the law. Moreover, a case often goes to a jury only after a judge already concluded that summary judgment for the defendant was not appropriate—that there were genuine issues of fact for the jury to consider and the defendant was not entitled to judgment as a matter of law. Challenging that legal conclusion after a jury verdict—that the defendant was not entitled to judgment as a matter of law—is similar to seeking to overturn an adverse summary judgment decision. There is nothing in the rules of law that should make it easier for defendants to challenge this kind of decision than for plaintiffs to challenge adverse summary judgment decisions.

Nonetheless, there is one large difference between the plaintiffs' and defendants' postures on appeal. When the defendant appeals a jury verdict, the court of appeals typically knows the size of the judgment awarded to the plaintiff. If the large size of an award positively influences a reversal, then we might expect reversals to be most likely in the cases with the highest damages awards. Although I coded size of verdict, I do not have sufficiently complete data to consider this factor at this time. I may consider it in future work on a later version of this database.

One other difference between plaintiffs and defendants should be considered in analyzing this data. There are relatively few appeals by defendants in the database. Of the 720 cases in the database, there are only 45 appeals by defendants. The fact that there are only 45 appeals by defendants most likely suggests that a winnowing out process has occurred before the appellate process begins. Because defendants are usually paying their lawyers on an hourly basis, they may have more financial incentive to pursue only strong cases. By contrast, once a plaintiff's lawyer has taken

the financial risk of taking a case to trial, it may seem worthwhile to pursue the appellate process if a trial outcome is not satisfactory. If the appeal is pro se, then it is virtually costless to the plaintiff. Even if a plaintiff has retained counsel, the plaintiff may not incur any additional cost if there is a contingency fee arrangement. Thus, defendants may be deterred from pursuing appeals by built-in factors that do not affect plaintiffs. The huge disparity between the number of appeals by plaintiffs and defendants may reflect these differing incentives.

C. Comparison with Other Areas of the Law

I have compared my ADA data to data from other comparable areas of law to see if such pro-defendant results are typical in appellate litigation. I used two different types of data sets to make that comparison. First, I examined the Title VII and ADEA data that was part of my ADA data. Second, I examined data sets external to my ADA data—some of this external data was collected by me and some of it was collected by other researchers.

1. Title VII and ADEA Data as Part of ADA Data Set

One way to offer a comparison between the ADA and other statutes is to examine how ADA plaintiffs fare when they allege ADEA or Title VII theories of discrimination as part of their ADA lawsuit. In order to offer this comparison, I relied exclusively on my ADA database of appellate opinions available on Westlaw. In this database, I coded the outcome on Title VII and ADEA actions that were a part of the ADA cases. The overall success rate for Title VII and ADEA did not differ significantly from the overall success rate for the ADA.

Table 3 displays the Title VII data in my ADA database.

Table 3: Title VII Data in ADA Cases

		Title VII claim on appeal?			Total
		No	Yes, and pro-P appellate disposition	Yes, and pro-D appellate disposition	
Trial Court Level	Pro-plaintiff	1	3		4
	Pro-defendant	9	6	80	95
Total		10	9	80	99

Of the 89 Title VII claims appealed by plaintiffs or defendants, only 3 (3.4%) had resulted in pro-plaintiff results at the trial court level. These three cases were all affirmed on appeal. Of the 86 Title VII claims appealed by plaintiffs, plaintiffs obtained a reversal in 6 cases (6.9%). This result was not significantly different than the 12% reversal rate I reported in Table 2 for ADA claims.

The ADEA data in my database shows a similar pro-defendant trend. Table 4 reports that data.

Table 4: ADEA Data in ADA Cases

		ADEA claim at appellate level?			Total
		No	Yes, and pro-P appellate disposition	Yes, and pro-D appellate disposition	
Trial Court Level	Pro-plaintiff	0	1	0	1
	Pro-defendant	5	4	50	59
Total		5	5	50	60

Of the 55 ADEA claims appealed in my database, only one had resulted in a pro-plaintiff judgment at trial. That one case was affirmed on appeal. Plaintiffs prevailed in 4 of the 54 (7.4%) pro-defendant ADEA outcomes that they appealed. As we saw in Table 2, plaintiffs prevailed in 12% of the ADA outcomes that they appealed. Those differences are not statistically significant.

This data suggests that the results in Title VII and ADEA cases are not different than the results in ADA cases when the Title VII or ADEA theory is presented as part of the ADA lawsuit. By contrast, as discussed above, Title VII plaintiffs fare much better than ADA plaintiffs when they bring a claim that is not necessarily part of an ADA lawsuit.

The contrasting results when Title VII claims are part of an ADA lawsuit and when they are not is perplexing. It does suggest that the "kitchen sink" approach of alleging as many theories of discrimination as possible may not be a profitable way to litigate civil rights cases. Another result is also possible. It may be that judges have such a strong anti-ADA bias or are so prejudiced against individuals with disabilities that they look unfavorably on any lawsuit brought by an individual with a disability. Many disabilities are invisible so that a judge in a Title VII action might ordinarily not be aware that a plaintiff has a disability. But when that disability is mentioned as part

of the pending ADA lawsuit, then the judge becomes aware of the disability in the Title VII lawsuit.

2. Comparison with Data outside My ADA Database

Other researchers have collected data on published decisions in other areas of the law such as defamation, nonprisoner constitutional tort litigation, prisoner constitutional tort litigation, and a control group of non-civil-rights litigation. This data did not include Title VII data for my time period of investigation. I therefore created a small data set to supplement the data made available by others to compare ADA data to Title VII data. This data includes only the first six months of 1999. I gathered this data from the headnotes of published appellate decisions available on Westlaw from January 1, 1999 to July 1, 1999. I chose this time frame so that the ADA and Title VII cases would be covering a comparable period of time. Since headnotes are available only for published decisions, these are all published decisions. I found that judicial outcomes under Title VII appear to be much more pro-plaintiff than published judicial outcomes under the ADA. For this time period, I found that Title VII plaintiffs obtained reversals in 34 of 100 cases (34%) and defendants obtained reversals in 12 of 29 cases (41%).

The pro-defendant bias in my database is stronger than the pattern found by researchers in other fields who have examined published decisions, as reflected in Table 5. Whereas plaintiffs obtained reversals in only 21% of ADA cases, they obtained reversals in 34% of Title VII cases, 26% of defamation cases, 38% of nonprisoner constitutional tort litigation, and 48% of prisoner constitutional tort litigation.³⁷ Similarly, whereas defendants obtained reversals in 60% of ADA cases, they obtained reversals in 41% of Title VII cases, 52% of defamation cases, 48% of nonprisoner constitutional tort cases, and 49% of prisoner constitutional tort cases. The ADA data looks most comparable to the defamation data, which is somewhat surprising since the defamation data is from a much earlier time period (1976–1979) when one might have expected judges to be more liberally disposed towards plaintiffs. Possibly, liberal judges' biases were constrained by the First Amendment issues in these cases.

³⁷ A comparison with other areas of the law, however, reflects the limited conclusions that one can draw from appellate data. The mere fact that a type of case is successful or unsuccessful at the appellate level does not necessarily reflect its success rate at the trial court level. This observation is most striking for prisoners' rights litigation. Plaintiffs' success rate at the district court level is only 18% in prisoner rights cases yet is 48% when plaintiffs appeal pro-defendant judgments. Plaintiffs prevail in 48% of prisoner rights cases on appeal whereas they prevail in only 38% of nonprisoner constitutional tort cases on appeal. By contrast, at the district court level, nonprisoner rights claims are successful much more frequently than prisoner rights claims (50% compared to 18%). Thus, although Table 3 reflects that ADA cases fare worse at the appellate level than prisoner rights claims, it would be wrong to conclude that ADA cases necessarily fare worse at the trial court level than prisoner rights claims.

Table 5: Published Appellate Data

	Plaintiff Appeals: % reversed	Defendant Appeals: % reversed
ADA Employment Discrimination Cases ³⁸	(64 of 310) 21%	(21 of 35) 60%
Title VII of the Civil Rights Act of 1964 ³⁹	(34 of 100) 34%	(12 of 29) 41%
Defamation Litigation ⁴⁰	(82 of 315) 26%	(66 of 126) 52%
Nonprisoner Constitutional Tort Litigation ⁴¹	(150 of 395) 38%	(43 of 89) 48%
Prisoner Constitutional Tort Litigation ⁴²	(53 of 111) 48%	(11 of 16) 69%
Control Group (Non-Civil- Rights Litigation) ⁴³	(144 of 411) 35%	(73 of 222) 33%

The area of law in which I would have expected to find the closest similarity to the ADA is the Title VII data. Yet, the Title VII data is much more pro-plaintiff than is the ADA data. Plaintiffs obtained reversals in 34% of Title VII cases as compared to 21% of ADA cases; defendants obtained reversals in 41% of Title VII cases as compared to 60% of ADA cases. There are many differences between ADA actions and Title VII actions, which may account for the different outcomes under these two

³⁸ This data reflects the published decisions in my database. Plaintiffs obtained reversals in 64 of 310 cases (20.6%) and defendants obtained reversals in 21 of 35 cases (60%), with 5 of the 21 cases constituting a lowering of the damages award. Based on the descriptive information made available on the other databases, I assume they included those 5 cases in their reversal category, because they defined reversal as a reversal of any aspect of the case.

³⁹ This data reflects published Title VII decisions from January 1, 1999, to July 1, 1999. I gathered this data from the headnotes of published decisions available on Westlaw. Plaintiffs obtained reversals in 34 of 100 cases (34%) and defendants obtained reversals in 12 of 29 cases (41%).

⁴⁰ This data reflects published defamation cases from 1976 to 1979. Professor Marc Franklin gathered this data. He found that plaintiffs obtained reversals in 82 of 315 cases (26%) and defendants obtained reversals in 66 of 126 cases (52%). See Franklin, *Winners and Losers*, *supra* note 30, at 455. For additional data, see Marc A. Franklin, *Suing Media for Libel: A Litigation Study*, 1981 AM. B. FOUND. RES. J. 797.

⁴¹ This data reflects published decisions from October 1, 1980, to December 31, 1985, in three circuits. See Eisenberg & Schwab, *supra* note 32, at 525 (Table III).

⁴² *Id.*

⁴³ *Id.* at 518 fig. 2 & n.53.

statutes. One important difference is that Title VII actions include reverse discrimination actions brought by Whites or men on the basis of race or gender discrimination, respectively. ADA actions, by contrast, can be brought only by individuals with disabilities. The cases in my database that involve both ADA cases and Title VII claims do not include any Title VII reverse discrimination cases. Nonetheless, the reverse discrimination cases are not the predominant type of case in these Title VII appellate cases.⁴⁴ Title VII is also a much older statute than the ADA, so lawyers may have a stronger basis for making rational decisions about their chances in litigation under Title VII than under the ADA.

This data, of course, does not directly tell us how plaintiffs fare at the trial court level. Of the cases in my database that resulted in published appellate decisions, only 35 of 345 (10.1%) reflected cases in which plaintiffs prevailed at the trial court level. Professors Eisenberg and Schwab, however, have been able to compare their published, appellate court data with actual decisions at the trial court level. Table 6 summarizes their data and lists the only available ADA data that I have:

Table 6: Trial Court Decisions

	Actual Trial Court Outcomes: Plaintiffs Prevail at Trial	Trial Court Outcomes That Result in Published Appellate Decisions: Plaintiffs Prevail at Trial
Constitutional Tort Cases (combined average of prisoner and nonprisoner)	23%	54%
Control Group (Non-Civil-Rights cases)	56%	61%
ADA Employment Discrimination Cases	unknown	10%

A view of constitutional tort litigation from a perspective that was limited to published, appellate decisions would therefore *overstate* plaintiffs' actual success rate at the trial court level. In the control group, that trend was true to a much smaller degree. If this data applied to ADA cases, however, it would suggest that plaintiffs are prevailing at an extremely small rate at the trial court level.

⁴⁴ I informally counted the reverse discrimination cases in the Title VII cases. I only counted three in a sample of over 100 cases. Thus, the reverse discrimination cases could not be causing the difference in outcome.

Of course, this trial court data does not reflect settlements. Eisenberg and Schwab report that 73% of non-civil-rights cases settle, 45% of nonprisoner constitutional tort cases settle, and 17% of prisoner tort cases settle.⁴⁵ It is hard to categorize settlements as pro-plaintiff or pro-defendant since plaintiffs typically settle for less than they seek in litigation.

Although I do not have settlement data for the ADA, I do have EEOC charge data. The EEOC reports that 15.7% of the charges filed under the ADA from 1992 through 2000 resulted in "merit resolutions"⁴⁶ at the pre-trial stage. That merit resolution figure, however, includes cases in which they found reasonable cause to believe that discrimination had occurred but were not able to obtain a successful conciliation. If the unsuccessful conciliations are taken out of their "merit resolution" category, then only 12.2% of all claims filed with the EEOC resulted in a pro-claimant outcome. It is important to note, however, that the charge data includes cases that result in "administrative closures" that would include cases in which a claimant sought a right-to-sue letter without pursuing the formal merit resolution process with the EEOC. Administrative closures were a substantial part of the charges filed with the EEOC—31.4% of all charges resulted in administrative closures. Some of these administrative closure cases may also have settled in advance of litigation, but the EEOC does not collect that data.

One way to assess the EEOC settlement data would be to consider the subset of only those cases in which resolution was possible. Of the 149,615 ADA resolutions that were possible of the charges filed with the EEOC, there was an administrative closure in 46,938 cases (31.4%).⁴⁷ Merit resolutions were, therefore, only possible in 102,677 cases. Of those 102,677 cases, the EEOC reports a merit resolution in 23,529 cases (22.9%). Even if one takes the unsuccessful conciliations out of that figure, it still leaves 18,349 merit resolutions in 102,677 cases (17.9%). That is roughly the same figure as Eisenberg found for prisoner tort cases.⁴⁸ It is much lower, however, than he found for non-civil-rights cases and non-prisoner constitutional tort cases.⁴⁹

Low settlement figures for claims considered by the EEOC may not be surprising given that their claimants bear no costs in filing a claim of discrimination. Moreover, lawyers may seek administrative closure in the strongest cases, because they are eager to seek a settlement or trial court victory for their client and see little benefit through

⁴⁵ Eisenberg & Schwab, *supra* note 32, at 532.

⁴⁶ See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *supra* note 24.

⁴⁷ There is some double counting in the EEOC's resolution categories. The 31.4% figure reported by the EEOC is a percentage of all resolutions, rather than a percentage of all charges. There were 141,810 charges but 149,615 resolutions due to double counting problems. See *id.*

⁴⁸ See *supra*, text accompanying note 45.

⁴⁹ *Id.*

their participation in the EEOC's process.⁵⁰ According to the EEOC's own data, the average award for a case in their merit resolution category is \$13,406.⁵¹ That size award would not be sufficient to pay a lawyer on an hourly basis or for a lawyer to earn decent money through a contingency agreement. It therefore may be rational for lawyers to opt out of the EEOC's administrative process rather than to spend months waiting for an award under \$20,000. Of the cases in my data set in which a plaintiff obtained a successful outcome, the average award was over \$100,000. It makes sense that the cases with potentially high awards are not reflected in the EEOC's settlement data.

The EEOC process may be filtering out the weak cases so that they do not clog up the court system. As one group of researchers has noted:

There can be little doubt that many Title I charges are frivolous. It does not follow, however, that the charge process is failing or even that it is being widely abused. The administrative charge process is designed to provide a relatively inexpensive and quick means of resolving disputes between workers and employers. It is very easy for an employee who suspects discrimination to file a charge, even the employee who lacks hard evidence to support the claim (as is often the case even in ultimately meritorious cases). There is no fee, no lawyer is required, and charges can be filed by mail or faxed to agencies. The initial screening of weak or malicious cases, that in standard litigation is performed by lawyers and court clerks, comes after filing in the ADA charge system.⁵²

Even so, the filter is not a big one. About 88% of the cases filed with the EEOC are eligible to become court cases after the issuance of the right-to-sue letter. More than half of those cases are ones in which the EEOC found no reasonable cause to believe that discrimination has occurred.⁵³ Without trial court data, it is hard to speculate on the effectiveness of the EEOC's filtering process.

In sum, plaintiffs appear to fare worse at the trial court and appellate levels under the ADA than in other areas of the law. For the remainder of this article, I will try to understand why plaintiffs fare worse under the ADA than under other areas of law.

⁵⁰ Administrative closure, however, can also be the result of inaction on the part of the EEOC or the parties rather than action on part of the plaintiff's lawyer. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *supra* note 24.

⁵¹ See EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *Cumulative ADA Monetary Charge Data—Monetary Benefits*, at <http://www.eeoc.gov/stats/ada-monetary.html> (last visited Feb. 19, 2001).

⁵² Kathryn Moss et al., *Different Paths to Justice: The ADA, Employment, and Administrative Enforcement by the EEOC and FEPAs*, 17 BEHAV. SCI. & L. 29, 43 (1999).

⁵³ See *supra* note 24.

III. CHANGES OVER TIME

In order to understand why plaintiffs appear to be faring so poorly under the ADA, I explored several hypotheses. In this section, I will explore one hypothesis. In the next section, I will explore several hypotheses through regression analysis.

My first hypothesis was that the ADA is a new statute with new issues, causing a high rate of reversal during an initial period of judicial uncertainty. In particular, the pro-plaintiff experience of many civil rights lawyers under CRA Title VII or the Rehabilitation Act may have caused them to overpredict their success rate under the ADA. If this hypothesis were correct, then I would expect the results to become more pro-plaintiff over time as plaintiff lawyers learn to make better judgments about which claims may be meritorious on appeal. In other words, they should self-correct for their initial miscalculation.⁵⁴ That trend has not yet begun, possibly because the courts are rendering increasingly pro-defendant decisions, thereby making it difficult for plaintiffs to make accurate predictions about the successful nature of their lawsuits.

⁵⁴ A less charitable way to explain this problem would be to say that plaintiff lawyers were not competent in the early years of ADA litigation, so that poor lawyering explains the poor results on appeal. For support of this hypothesis, see Jeffrey A. Van Detta & Dan R. Gallipeau, *Judges and Juries: Why Are So Many ADA Plaintiffs Losing Summary Judgment Motions, and Would They Fare Better Before a Jury? A Response to Professor Colker*, 19 REV. LITIG. 505, 574 (2000):

[T]he problem appears largely to arise from lawyering that does not take into account the regulations, interpretation, and guidance in developing the theory of the case, planning and executing discovery, and effectively presenting sufficient probative evidence on key elements of the claim—particularly the existence of a disability—to survive summary judgment.

If Van Detta and Gallipeau are correct that poor lawyering explains some of these adverse results, one still must wonder why these results have not self-corrected over time. Lawyers who do not prevail under the ADA will rarely receive significant compensation, given the prevalence of contingency fee arrangements in civil rights cases. One would expect that adverse results would have a filtering effect on lawyers' judgments even if it did not improve the quality of their lawyering.

Table 7 reports the results over time from August 3, 1994, to July 26, 1999.

Table 7: ADA Appellate Outcomes: 1994–1999

Year	Frequency of Pro-Defendant Results	Percentage
1994	5 of 6	83%
1995	35 of 42	83%
1996	96 of 114	84%
1997	158 of 178	89%
1998	189 of 219	86%
1999	140 of 161	87%
Total	623 of 720	87%

The level of pro-defendant outcomes has remained relatively constant since 1996. It therefore does not appear that the ADA is currently experiencing a period of fluctuations in appellate judicial outcomes. It has achieved a stable, although highly pro-defendant, rate of judicial outcomes.⁵⁵

One explanation for this consistent, pro-defendant outcome in the early years of litigation is that plaintiffs have unrealistically high expectations for the ADA, and are therefore pursuing nonmeritorious litigation. I was interested to see if this purported problem also occurred in the early years of Title VII enforcement. Interestingly, I found exactly the opposite pattern under Title VII. I constructed a database with the early years of Title VII appellate cases that are available on Westlaw. I coded 105 cases from May 3, 1967, through December 31, 1972. These decisions were overwhelmingly pro-plaintiff. These results were also relatively stable over this time period.

⁵⁵ The American Bar Association has also surveyed ADA employment discrimination cases since 1992. Their methodology includes *all* available ADA decisions, including district court and Supreme Court. Their methodology would also appear to include some double counting—a case might be counted at the trial court, appellate court, and Supreme Court level. Because reported district court decisions are most likely to be summary judgments, their methodology produces more pro-defendant decisions than if one only examines appellate results. Thus, the ABA reports that the overall employer win rate is 91.6% from 1992 to 1997, a somewhat higher figure than I report. Interestingly, the ABA has found that the employer win rate under their methodology has risen in the last two years. They report a 94.4% employer win rate for 1998 and a 95.7% employer win rate for 1999. See John W. Parry, *Highlights & Trends: 1999 Employment Decisions Under the ADA Title I—Survey Update*, 24 MENTAL & PHYSICAL DISABILITY L. REP. 348, 349 (2000).

Table 8: Title VII Appellate Outcomes: 1967–1972

Year	Frequency of Pro-Defendant Results	Percentage
1967	2 of 2	100%
1968	0 of 3	0%
1969	3 of 15	20%
1970	3 of 15	20%
1971	5 of 27	18.5%
1972	12 of 43	28%
Total	25 of 105	24%

This comparative data suggests that judicial attitude towards a statute may be the most important predictor of litigation results. In the early years of Title VII enforcement, it appears that the appellate judges were often rendering more pro-plaintiff interpretations than the trial courts. That result can be seen in Table 9.

Table 9: Title VII Appellate Results: 1967–1972

Trial Court Outcome	Appellate Court Outcome Affirmed	Appellate Court Outcome Reversed	Total
Pro-Defendant	20	63	83
Pro-Plaintiff	17	5	22
Total	37	68	105

The 80 results that I characterized as pro-plaintiff were the 63 reversals of pro-defendant trial court decisions and the 17 affirmances of pro-plaintiff trial court decisions. The appellate courts reversed 63 of 83 (76%) of the pro-defendant trial court decisions and reversed only 5 of 22 (23%) of the pro-plaintiff trial court decisions. Given the high rate of reversal of pro-defendant trial court outcomes, I would characterize the appellate courts as more pro-plaintiff than the trial courts.

The ADA results are exactly the opposite, as reflected in Table 10.

Table 10: ADA Appellate Results: 1994–1999

Trial Court Outcome	Appellate Court Outcome Affirmed	Appellate Court Outcome Reversal	Total
Pro-Defendant	594	91	675
Pro-Plaintiff	17	28	45
Total	611	109	720

In the ADA cases, the appellate courts reversed only 91 of 675 (13%) of cases in which the trial court had rendered a pro-defendant result. By contrast, they reversed 28 of 45 (62%) of cases in which the trial court had rendered a pro-plaintiff result. Thus, I would characterize the appellate courts as more pro-defendant than the trial courts.

A question that I would like to investigate in further research is when did the Title VII results become less pro-plaintiff? A preliminary investigation that I have conducted of recent Title VII cases suggests that Title VII appellate results are currently pro-defendant, although somewhat less pro-defendant than ADA cases.⁵⁶ If I could code the cases decided between 1972 and 1998, it would be interesting to learn when the shift from pro-plaintiff to pro-defendant results occurred.

From the limited data that I have available at this time, however, some preliminary observations are warranted. First, it is clear that the appellate court docket has grown enormously since Title VII was passed in 1964. There are only 105 cases in my Title VII database whereas there are 720 cases in my ADA database for the first eight years of the respective statutes. It is true that Westlaw included few unpublished decisions from the time period between 1964 and 1972; however, even if I limit myself to published decisions, there is a huge disparity between Title VII and ADA litigation. There were 310 published ADA appellate decisions as compared to about 100 published Title VII decisions in the statutes' first eight years.

By contrast, the Supreme Court appears to have played a more immediate and significant role in the development of Title VII than in the development of the ADA. Of the 105 cases in my Title VII database, ten of them had a "red flag" in Westlaw, meaning that the result was reversed, in whole or in part, on appeal. While the appellate court docket has swelled in the last several decades, the Supreme Court's docket has contracted. Although the Supreme Court has been comparatively active in considering ADA cases (as compared to other kinds of cases), it has rendered only

⁵⁶ See Table 5, *supra* p. 254 (reporting Title VII cases from January 1, 1999 to July 1, 1999) & Table 8, *supra*, p. 260 (reporting Title VII cases from 1967 to 1972).

seven decisions that affect ADA Title I since 1990.⁵⁷ The appellate courts have a greater opportunity today than they did several decades ago to decide numerous cases before the Supreme Court renders many decisions interpreting a new statute. It therefore may be more possible for appellate outcomes to be unpredictable in the early years of a statute since comparatively fewer rules of law will have been settled by the Supreme Court.⁵⁸

But that explanation is problematic in the current political climate. If the Supreme Court, for example, were more liberal than the appellate courts, then one might expect litigants to pursue cases even though they assessed their chances in the appellate courts to be poor, if they thought they might get a more receptive audience in the Supreme Court. But, in fact, the opposite result is true. The appellate courts, on average, have been more liberal than the Supreme Court on ADA cases. For example, the overwhelming majority of appellate courts had accepted a broader definition of "disability" than was eventually accepted by the Supreme Court.⁵⁹ Although the Supreme Court has rendered some pro-plaintiff decisions under the ADA,⁶⁰ lawyers in practice in all but the Fourth Circuit would probably be inclined to conclude that their chances of success are better before the lower courts than before the Supreme Court.

Another explanation for my data is that ADA plaintiffs are facing a moving target. They may have initially miscalculated their chances of prevailing in the lower

⁵⁷ See *Albertsons, Inc. v. Kirkingburg*, 527 U.S. 555 (1999) (holding that employer was not required to justify adherence to federal regulation when a waiver was available); *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795 (1999) (holding that employee's receipt of Social Security benefits did not preclude bringing an ADA claim where an adequate explanation was offered); *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999) (holding that employer's conduct need not be egregious to justify recovery of punitive damages); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999) (finding that employee failed to demonstrate substantial limitation of one or more major life activities); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) (finding employee not disabled within meaning of statute); *Bragdon v. Abbott*, 524 U.S. 624 (1998) (holding HIV infection was a "disability" under ADA even though it has not progressed to the so-called symptomatic phase); and *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70 (1998) (finding collective bargaining agreement arbitration clause did not require employee to use the procedure for alleged ADA violation).

⁵⁸ The appellate courts, themselves, are also being less forthcoming in developing rules of law to guide future litigation because of their increasing tendency to decide unpublished decisions. According to Professors Merritt and Brudney, nearly 80% of all dispositions on the merits are unpublished. See Merritt & Brudney, *supra* note 29, at 72.

⁵⁹ The First, Third, Seventh, Eighth, Ninth, and Eleventh Circuits had adopted a broad definition of disability; whereas, only the Fourth, Sixth, and Tenth Circuits had adopted a more narrow definition. See Colker, *Windfall*, *supra* note 2, at 153 (summarizing cases). In *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), the Supreme Court adopted the more narrow definition, affirming the Tenth Circuit's position.

⁶⁰ See, e.g., *Bragdon v. Abbott*, 524 U.S. 624 (1998) (holding that HIV infection can be covered under the ADA).

courts, based on their positive experience with disability discrimination claims under the Rehabilitation Act. When it became clear that the courts were narrowly interpreting the ADA, they may have adjusted their expectations and made more conservative decisions about litigation. But the tenor of the courts' decisions became even *more* pro-defendant, so that they had not properly adjusted far enough in a pro-defendant direction.⁶¹

I have some empirical support for this hypothesis from Rehabilitation Act data. I instructed a team of coders to code appellate cases under sections 501, 503, or 504 of the Rehabilitation Act involving employment discrimination issues.⁶² The team coded cases in the time period 1981–1992 so that I could assess the perspective of a lawyer who was experienced with disability discrimination lawsuits on the eve of the enforcement of ADA Title I.⁶³ The team coded whether the trial court and appellate court outcomes in these cases were pro-plaintiff or pro-defendant. Their results suggest that a lawyer who read the available decisions on Westlaw would learn that defendants were successful in the appellate courts about 65% of the time. Table 11 summarizes those results over time.

⁶¹ The Supreme Court's first major ADA decision in *Bragdon v. Abbott*, 524 U.S. 624 (1998), in which it held that individuals with infectious diseases, like HIV infection, could be considered to be disabled under the ADA may have actually misled plaintiffs into expecting a liberal interpretation of the ADA from the Supreme Court. With the series of conservative decisions from 1999, we may still see a period of miscalculation by plaintiffs in which they lose in the appellate courts as those courts seek to implement the Supreme Court's narrow definition of disability.

⁶² In order to create a data set comparable to the ADA data set, we included only cases decided on the merits, involving issues that could also arise under the ADA. We therefore did not include cases involving statute of limitations or attorneys fees issues (since those kinds of cases had also not been included in the ADA data). We also did not include cases involving jurisdictional or coverage issues such as whether the defendant received federal financial assistance and was thereby covered under section 504. Because receipt of federal financial assistance is not a requirement for coverage under the ADA, these cases were not parallel to the ADA cases in the database.

⁶³ ADA Title I became effective on July 26, 1992.

Table 11: Rehabilitation Act Appellate Outcomes: 1981–1992

Year	Frequency of Pro-Defendant Results	Percentage
1981	2 of 4	50%
1982	1 of 4	25%
1983	3 of 4	75%
1984	1 of 1	100%
1985	5 of 6	83%
1986	5 of 5	100%
1987	3 of 5	60%
1988	6 of 9	67%
1989	1 of 3	33%
1990	7 of 11	64%
1991	11 of 17	65%
1992	7 of 11	64%
Total	52 of 80	65%

The pro-defendant success rate on appeal under the Rehabilitation Act is considerably lower than it is under the ADA. As reflected in Table 7, the pro-defendant success rate on appeal under the ADA has remained consistently at 87% throughout the period under investigation. I have also coded whether the ADA cases in my database were also section 504 cases. The ADA cases that are also section 504 cases in my database fare the same rate of success on appeal as the non-section 504 ADA cases—87% pro-defendant. I will be collecting more section 504 data in the future to determine the fate of all section 504 cases after the passage of the ADA. Was passage of the ADA, in fact, harmful to the Rehabilitation Act by decreasing the overall likelihood of success for plaintiffs on appeal in Rehabilitation Act cases?

Until the case law under the ADA becomes more stable and consistent over time, plaintiffs may find themselves adjusting to a moving target. It is inconceivable that non-pro se plaintiffs could continue to miscalculate their chances to such a large extent in litigation. The CRA Title VII data shows that massive adjustments can occur over time (application of the statute has evolved from pro-plaintiff to pro-defendant over time in the appellate courts). The conditions for a major adjustment, however, have not yet occurred under the ADA, because of the lag time between a Supreme Court decision and lower court litigation. The current ADA cases will have been filed

before the Supreme Court's decisions on the definition of disability. It will take several years for a new generation of cases to be filed that have incorporated these new sets of rules. By then, however, the Supreme Court may have rendered other conservative decisions that the plaintiff bar has not yet anticipated. Thus, the predicate to "rational litigation" may not yet exist for the plaintiff bar.⁶⁴

IV. REGRESSION ANALYSIS

A. *General Results*

Having rejected my first hypothesis—that the ADA's status as a new statute explains the high pro-defendant outcomes—I then turned to other hypotheses that I could assess through regression analysis. In order to ascertain those factors, I coded various factors in my database of ADA appellate outcomes.⁶⁵ These factors related to various hypotheses that I had about ADA outcomes. My coding sheet is attached as Appendix A.

First, I coded background information about the origin of the cases including the appellate court in which the litigation took place.⁶⁶ Second, I coded the plaintiff's occupation to determine if, for example, blue collar workers fared worse under the statute than management employees. For these purposes, I used occupational classifications created by the United States military with one exception. I added the category "law enforcement," because I observed that there were a significant number of cases with plaintiffs in that occupation.⁶⁷ I coded defendant characteristics by coding whether the defendant was public or private. Third, I coded the type of disability alleged by the plaintiff. I wanted to see if individuals with uncontroversial disabilities, such as mobility impairments or hearing impairments, fared better than individuals with controversial disabilities such as back impairments or HIV infection. I used the EEOC's disability categories for this coding so that I also could observe how representative appellate cases are of cases originally filed with the EEOC. Are certain types of disabilities more likely to result in appellate litigation? Fourth, I coded the theory of disability alleged by the plaintiff. I was particularly interested in seeing

⁶⁴ The ABA's most recent data supports this view. The ABA data suggests that the lower courts are adjusting to recent conservative Supreme Court decisions by rendering results that are increasingly pro-defendant. See *EQUAL EMPLOYMENT OPPORTUNITY COMM'N*, *supra* note 50.

⁶⁵ I used SPSS to enter this data. I conducted the logistic regression analysis that is reported in this article in SPSS. My research assistant also conducted these analyses in Stata Release 6.0. For further discussion of the use of regression analysis in legal scholarship, see Merritt & Brudney, *supra* note 29, at 79–84.

⁶⁶ The Fifth Circuit, a circuit with a moderate position on the mitigating measures issue during this time period, served as the reference category for the other eleven circuit court variables. See *Washington v. HCA Health Serv., Inc.*, 152 F.3d 464 (5th Cir. 1998).

⁶⁷ I used the category "white collar" as the reference category for the occupational variables.

if individuals with reasonable-accommodation allegations fared worse than individuals who alleged an unlawful discharge. Finally, I coded whether EEOC participation in a lawsuit was a significant factor in predicting a successful outcome. EEOC participation could take two forms—participation as a party or participation as an amicus.

There were three factors that I was fairly certain would predict appellate outcome and therefore are contained in the regression model: lower court outcome, whether a party is appealing a verdict, and whether the plaintiff is proceeding pro se. The lower court outcome variable reflects whether the plaintiff or defendant won at trial. Because appellate courts most typically affirm trial court outcomes, it was important that I control for the result at trial. Otherwise, I would be overstating the tendency of appellate judges to render pro-defendant results, since the trial court results in my database were overwhelmingly pro-defendant. The verdict variable reflects the type of decision from which the party is appealing. The verdict variable was coded as a "1" for pro-plaintiff or pro-defendant jury verdict, pro-plaintiff or pre-defendant bench trial, pro-plaintiff preliminary injunction, and pro-plaintiff final injunction. It is coded "0" for all other outcomes. This variable reflects, as discussed in Part I of this paper, that the rules of law make it particularly difficult to overturn verdicts. Thus, I would expect a "verdict" outcome at trial to predict an unsuccessful appeal. Finally, the pro se variable reflects whether a party appealed the trial court outcome on a pro se basis. It is common knowledge that pro se plaintiffs are rarely successful in the appellate courts. The fact that an attorney has not been willing to take those cases for compensation may even suggest that many of those cases are frivolous. Hence, I would expect pro se outcome to predict an unsuccessful appeal. By having each of these three factors in my regression analysis, I was able to control for their effect on appellate outcome.

Table 12 reflects the regression results in a logistic regression analysis in which appellate outcome is the dependent variable. A pro-defendant outcome on appeal is a "0" and a pro-plaintiff outcome is a "1." Therefore, a positive coefficient means that the factor correlates with a pro-plaintiff outcome on appeal. If that coefficient is significant (or approaching significance), the asterisk indicates the degree of significance.⁶⁸

⁶⁸ Social scientists typically designate results with a p-value of 0.05 or less as "significant." For general discussion of the use of social science techniques as applied to data involving legal issues, see Deborah Jones Merritt, *Research and Teaching on Law Faculties: An Empirical Exploration*, 73 CHI. KENT. L. REV. 765, 780–82 (1998). It is also common for social scientists to discuss a p-value that is greater than 0.05 but less than 0.10 as "approaching significance." See *id.* at 782 n.59. "It is appropriate to note such relationships in exploratory studies like the present one, although such results should be taken as suggestive rather than established." *Id.*

**Table 12: Factors that Affect Appellate Outcome of
Americans with Disabilities Act (ADA)**

Variable	Coefficient
Lower Court Outcome⁶⁹	
Pro-Plaintiff Verdict	1.1608**
Pro-Defendant Verdict	-.5470
Pro-Plaintiff Nonverdict	.5899***
Theories of Disability⁷⁰	.087.0
Actually Disabled	.1016
Record of Disability	-.1445
Regarded as Disabled	.0093
Not Disabled	.9304
Major Life Activity, non-work	.2324
Major Life Activity, work	-.5266
Major Life Activity, unknown	-.3967
Discrimination Alleged⁷¹	
Demotion	1.6288**
Discharge	.0244
Harassment/Hostile Work Environment	-.7843
Failure to Hire	.2690
Medical Exams	.2218
Failure to Promote	.1368
Otherwise Qualified/Essential Functions	.4586

⁶⁹ In this regression analysis, I used the category of pro-defendant nonverdict as the reference category for the other lower court outcomes, because pro-defendant nonverdict was the most common lower court outcome. The variable that is the reference category must be excluded from the regression equation.

⁷⁰ Because a plaintiff could be coded as having alleged more than one of these theories of disability, it was not necessary to have an excluded variable for comparison purposes.

⁷¹ Because a plaintiff could allege more than one of these theories of discrimination, it was not necessary to have an excluded variable for comparison purposes.

Variable	Coefficient
Reasonable Accommodation	.1081
Failure to Reinstate	.5014
Retaliation	-.0435
Suspension or Involuntary Leave (Temporary)	.5513
Terms and Conditions (Monetary)	-.0536
Terms and Conditions (Non-Monetary)	-.1557
Defenses Alleged⁷²	
Judicial Estoppel	.7328
No Knowledge of Disability	-.5684
Direct Threat to Health/Safety of Others	-.6163
Types of Physical or Mental Impairment⁷³	
Asthma	.4856
Back	-.0920
Blood Disorder	-1.3416
Cancer	-.4488
Diabetes	1.2244*
Extremities	.7333*
Hearing	1.4190
Internal Organs	.4505
Neurological	.6186
Other	.9674
Psychological	.5477
Respiratory	.5507
Substance Abuse	-1.7884

⁷² Because a defendant could allege more than one of these defenses, it was not necessary to have an excluded variable for comparison purposes.

⁷³ Because a plaintiff could allege more than one of these theories of impairment, it was not necessary to have an excluded variable for comparison purposes.

Variable	Coefficient
Unknown	.3857
Visual	1.0282
Circuit Effects⁷⁴	
DC Circuit	1.8566**
1st. Circuit	.9221
2nd. Circuit	1.4221**
3rd. Circuit	1.4208**
4th. Circuit	-2.1329**
5th. Circuit	-.5398
7th. Circuit	.3233
8th. Circuit	-.2654
9th. Circuit	.5393
10th. Circuit	-.3633
11th. Circuit	.6207
Plaintiff Occupational Status⁷⁵	
Administrative	.6803
Blue Collar	.2415
Clerical	.1114
Law Enforcement	-.9982
Technical	.1656
Unknown	.4058

⁷⁴ The excluded circuit for comparison purposes is the Sixth Circuit. I chose this circuit because it is a relatively typical circuit in terms of whether its decisions are pro-Plaintiff. It also has a typical publication practice.

⁷⁵ The excluded occupational status for comparison purposes is "Other white collar." I chose this category because it was one of the largest categories and appeared to have results that were typical for the data set as a whole.

Other Factors	
EEOC as Amicus	2.0238***
EEOC as Participant	.8531
Other Non-ADA Issues	.0004
Pro Se	-2.3288***
Public Defendant	.5746
Constant	-3.7655***

* $p < .1$, ** $p < .05$, *** $p < .01$, two-tailed tests

B. *Analysis*

1. *Lower Court Outcome*

Many of the factors that I coded were statistically significant. As expected, a pro-plaintiff outcome at trial strongly correlated with a pro-defendant outcome on appeal. The coefficient for pro-plaintiff verdict is higher than the coefficient for pro-plaintiff nonverdict, meaning that a pro-plaintiff verdict has a higher probability of resulting in success for the plaintiff on appeal than as pro-plaintiff nonverdict. That result can be summarized in a predicted probability table.

One way to understand the significance of the regression analysis is to conduct a predicted probabilities analysis. For the purpose of this analysis, we shall assume a typical ADA case: an individual who alleges to be actually disabled brings a claim of a discriminatory discharge. Let us further assume that his disability is a back injury, that he lives in the Sixth Circuit, that he lost his case in the trial court on a grant of summary judgment or dismissal to the defendant. Finally, let us assume that the EEOC has not chosen to participate in the case on appeal and that the plaintiff is a blue collar worker. I have chosen these characteristics because they are some of the most common variables in the database. A predicted probabilities analysis will allow us to ask how his chances of success change when we change one or more of these variables.⁷⁶ What if he has diabetes rather than a back injury? What if he lives in the

⁷⁶ In understanding predicted probabilities, however, one must consider them in relationship to the regression results. The results from a predicted probability analysis are reliable only if the variable under study is significant in predicting judicial outcome. Otherwise, the predicted probability result might be due to chance, rather than due to a real relationship between the variable under study and outcome. For example, blood disorders (such as HIV) infection did not correlate significantly with appellate outcome in the regression equation. The predicted probability analysis reveals that individuals with blood disorders could be predicted to do less well in appellate

Fourth Circuit rather than the Sixth Circuit? What if there had been an adverse jury verdict rather than grant of summary judgment? And what if the EEOC intervened as an amicus in the court of appeal?

In Table 13, I ask how the predicted probability of plaintiff success changes depending on the outcome at trial.

Table 13: Predicted Probabilities: Lower Court Outcome

Pro-Plaintiff Verdict	0.085
Pro-Defendant Verdict	0.017
Pro-Plaintiff Non-Verdict	0.050
Pro-Defendant Non-Verdict	0.028

In the “profile” case, a plaintiff has a 2.8% chance of prevailing if he or she appeals a pro-defendant non-verdict. The chance of plaintiff prevailing rises to 5.0% if the plaintiff is defending a defendant appeal of a pro-plaintiff non-verdict. The chance of plaintiff prevailing rises to 8.5% if the plaintiff is defending a defendant-appeal of a pro-plaintiff verdict.

Another way to consider this data, however, is to recognize that plaintiffs have a 91.5% chance of losing on appeal, even when they are defending a verdict. Because verdicts are the easiest type of judgment to defend on appeal, these results demonstrate how difficult it is for plaintiffs to prevail on the ADA cases in this database.

2. Theory of Disability

The theory of disability was not a significant factor in predicting appellate outcome. It did not matter whether plaintiff alleged that he or she was actually disabled or regarded as disabled in predicting appellate outcome.

3. Type of Discrimination Alleged

The type of discrimination that was alleged was a significant factor in predicting appellate outcome. A plaintiff who alleged a discriminatory demotion was significantly more likely to prevail than other plaintiffs. Table 14 reflects the predicted probabilities for different allegations of discrimination.

litigation than individuals with back injuries but that result may be spurious, because blood disorders were not statistically significant. By contrast, EEOC participation as an amicus was a highly significant factor in predicting appellate outcome. The predicted probability result is therefore a very useful statement of how much change in outcome can be expected when the EEOC participates as an amicus.

Table 14: Discrimination Alleged

Demotion	.132
Discharge	.028
Harassment	.013
Failure to hire	.037
Medical exams	.036
Failure to promote	.033
Otherwise qualified	.045
Reasonable accommodation	.032
Failure to reinstate	.047
Retaliation	.028
Suspension/Involuntary Leave	.049
Terms and conditions (monetary)	.027
Terms and conditions (non-monetary)	.025

As this table reflects, plaintiffs who alleged a discriminatory demotion had a 13.2% chance of prevailing whereas plaintiffs alleging other forms of discrimination had between a 1.3% and 4.9% chance of prevailing. Although harassment claims had the lowest predicted probability (reflecting their high negative coefficient in the regression analysis), that result was not statistically significant. Nonetheless, of the 24 cases in the database in which plaintiff alleged harassment, plaintiffs were successful in only 2 of them (8.3%). By contrast, of the 19 cases in the database in which plaintiff alleged a demotion, plaintiffs were successful in 5 of them (26.3%). With a larger database, it is possible that one might find that harassment claims correlated significantly with lack of success on the part of a plaintiff.

The demotion data is somewhat surprising. It is certainly reasonable to expect people who hold jobs to fare better in discrimination cases than individuals who are merely seeking to be hired. Thus, I would have expected failure to hire cases to fare worse than demotion cases. But if holding a job is a positive factor in a discrimination claim, then discharge claims should also have been more successful than other types of cases. An allegation of an unlawful discharge, however, was not a significant factor in predicting a pro-plaintiff result. In fact, although the results are not statistically significant, the coefficient for the discharge factor was *negative*. Were I to combine discharge and demotion into a single factor, the new factor—loss of job status—would not be significant.

It is possible that plaintiffs who allege a demotion rather than an outright discharge are viewed more favorably by the courts, because they appear to be more qualified for employment. Alternatively, it is possible that my demotion result is a spurious result in the data set that will disappear over time.

4. *Defenses*

No statistical significance was found for the defenses that were raised by the defendant. Thus, I did not conduct a predicted probabilities analysis on that data.

5. *Type of Impairment*

The type of physical or mental impairment was found to be statistically significant. Plaintiffs who alleged that they had an impairment due to diabetes or extremities impairments⁷⁷ were more likely to prevail than other plaintiffs.

Table 15 reflects the predicted probabilities.

Table 15: Disability

Asthma	0.049
Back	0.028
Blood	0.008
Cancer	0.020
Diabetes	0.098
Extremities	0.062
Hearing	0.116
Internal Organs	0.048
Neurological	0.056
Other	0.077
Psychological	0.052
Respiratory	0.052
Substance Abuse	0.005
Unknown	0.045
Visual	0.082

The plaintiffs with extremities impairments had a wide variety of problems ranging from arthritis to amputated limbs. Those cases, however, did not include mere back injuries and may therefore have seemed like more sympathetic cases to judges on appeal. (Back impairments are the most commonly alleged impairment under the ADA and subject to the common questions about unverifiable soft tissue injuries that

⁷⁷ Extremities impairments included missing limbs or digits; hand, arm, or shoulder impairments (without paralysis); and arthritis. There was a separate category for back or orthopedic impairments, as well as a separate category for paralysis.

one sees in tort and worker compensation cases.) This data preceded the Supreme Court's recent decisions narrowing the definition of disability. Those cases are likely to have an influence on diabetes cases so it will be interesting to see if this trend continues over time.

The predicted probability table also reflects that plaintiffs who allege substance abuse impairments have only a 0.5% chance of prevailing as compared to the profile case with a 2.8% chance of prevailing. Those results, however, were not statistically significant and are therefore not reliable.

6. Circuit

The circuit in which the plaintiff litigated was also a highly significant factor. As the table shows, the D.C., Second, and Third Circuits were significantly more likely to produce pro-plaintiff results than the Sixth Circuit. The Fourth Circuit was significantly more likely to produce pro-defendant results than the Sixth Circuit. The Third Circuit results, however, may have been affected by its notoriously low publication rate.⁷⁸ Table 16 compares publication rates by circuits in my database.

Table 16: Publication Practice By Circuit

Circuit	Published	Unpublished	Total
D.C. Cir.	4	5	9
1st Cir.	22	2	24
2nd Cir.	14	30	44
3rd Cir.	18		18
4th Cir.	16	85	101
5th Cir.	49		49
6th Cir.	28	76	104
7th Cir.	73	25	98
8th Cir.	49	17	66
9th Cir.	23	78	101
10th Cir.	24	57	81
11th Cir.	25		25
Total	345	375	720

⁷⁸ See Merritt & Brudney, *supra* note 29, at 78 n.70.

Not only does the Third Circuit not make its unpublished decisions available to the public but it publishes relatively few opinions. As discussed earlier, published decisions tend to be more pro-plaintiff than unpublished decisions. Because the Third Circuit does not make its unpublished decisions available to electronic services and publishes a comparatively small percentage of its decisions, its appellate results are skewed in a pro-plaintiff direction as compared to the other circuits. Table 17 reports the predicted probabilities for the circuits.

Table 17: Circuit Effects

D.C. Cir.	0.157
1st Cir.	0.068
2nd Cir.	0.107
3rd Cir.	0.107
4th Cir.	0.003
5th Cir.	0.017
6th Cir.	0.028
7th Cir.	0.039
8th Cir.	0.022
9th Cir.	0.047
10th Cir.	0.020
11th Cir.	0.051

These results suggest that a plaintiff's predicted probability is highest in the D.C. Circuit and lowest in the Fourth Circuit, ranging from 15.7% to 0.3%. The Fourth Circuit result is consistent with the widespread media coverage about the conservative nature of the Fourth Circuit decisions.

7. Plaintiff's Occupation

Plaintiff's occupation was not a significant factor in predicting appellate outcome. I have considered coding the size of the defendant to see if factors about the defendant may predict appellate outcome. At this time, however, I have not found a useful methodology for coding the size of defendants. I did code whether the defendant was a public or private entity; that factor was not significant in predicting appellate outcome.

I did conduct a predicted probabilities analysis of occupation. Surprisingly, plaintiffs with law enforcement jobs fared the worse in ADA cases as reflected in Table 18.

Table 18: Occupation

Administrative	0.043
Blue Collar	0.028
Clerical	0.111
Law Enforcement	0.008
Technical	0.026
Unknown	0.033
Other White Collar	0.022

Those results, however, are not statistically significant.

8. EEOC Participation as Amicus

The only one of the factors that is surprising in the regression analysis is the correlation between EEOC amicus participation and pro-plaintiff results. In a previous article, I documented the second class status that has been accorded EEOC regulations under civil rights statutes.⁷⁹ The trilogy of decisions in 1999 confirmed those results. Thus, it may be surprising that EEOC participation as amicus would be a helpful rather than hurtful signal for plaintiffs. Of course, it is possible that EEOC participation did not *cause* the pro-plaintiff outcome; the EEOC simply happened to choose to participate in cases that were already likely to yield pro-plaintiff results. It is also interesting to note that EEOC participation as a *party* did not significantly correlate with a pro-plaintiff outcome. That result may be due to the fact that there were only 8 cases in the database in which the EEOC participated as a party, thereby making it difficult to find statistical significance. By contrast, there were 42 cases in which the EEOC participated as an amicus. With more data, I may find that EEOC's status as a party is a significant factor. Alternatively, the prejudice against the EEOC limits the degree to which they can be effective in a lawsuit. Thus, EEOC participation as an amicus may be more acceptable to some judges than EEOC participation as a party.

⁷⁹ See Colker, *Windfall*, *supra* note 2, at 137–50.

Table 19 shows the predicted probabilities when the EEOC participates as an amicus.

Table 19: EEOC Amicus?

Yes	0.180
No	0.028

Plaintiff's predicted success rate increased from 2.8% to 18.0% when the EEOC intervenes as an amicus.

V. CONCLUSION

My analysis of appellate decisions under the ADA suggests that defendants are much more likely than plaintiffs to prevail in appellate litigation. Although defendant success rates are generally higher than plaintiff success rates in other comparable areas of the law, the results under the ADA are more pro-defendant than has been found by other researchers. When ADEA and Title VII issues are part of ADA litigation, however, these other causes of action also fare quite poorly. It is only when Title VII cases are brought independently from ADA cases that they fare better than ADA cases. These comparative results suggest that there is something distinctive about ADA litigation that accounts for these disparate pro-defendant results.

It is possible to account for judicial outcomes by saying that plaintiffs are making poor decisions about which cases to litigate and appeal. (The EEOC, however, appears to be using its resources effectively in deciding which cases in which to participate as an amicus.) Over time, however, one would expect the plaintiff bar to respond to the statistical reality of the unlikelihood of prevailing. With contingency fee awards the predominant method of compensation, plaintiff lawyers have a very strong incentive to make conservative judgments about litigation.

One factor that may be causing the plaintiff bar to overpredict judicial outcomes is that ADA cases appear to be faring much worse than Title VII litigation. ADA appellate outcomes under the ADA are also much more pro-defendant than were appellate outcomes under the Rehabilitation Act on the eve of the effective date of the ADA. The litigation assumptions that these lawyers may be making based on their Title VII experience may not be applicable to the ADA.

It is also possible that plaintiff lawyers simply do not yet fully understand the legal requirements of the ADA. To the extent that cases lose because of the distinctive features of the ADA—like the reasonable accommodation requirement and the definition of disability—that hypothesis may make sense. But my data does not support that hypothesis, because reasonable accommodation cases do not fare worse than other kinds of ADA cases.

I also tried to determine which factors in litigation may predict judicial outcome. The significant factors included EEOC participation as amicus, pro se status, trial court outcome, D.C. Circuit, Second Circuit, and Third Circuit. There was a trend toward significance in the First and Ninth Circuits. The Third Circuit result may reflect a narrow decision about what kinds of cases to make available to the public rather than an overall pro-plaintiff bias. There was a trend toward diabetes and extremities disabilities predicting pro-plaintiff outcomes on appeal. EEOC participation as an amicus was a very strong factor in predicting a pro-plaintiff outcome on appeal.

In general, it is very difficult to paint a precise picture of what factors are significant in predicting winning or losing ADA litigation, because many decisions are per curiam and provide researchers with few facts about the case or outcome. Although my database contains 720 cases, only a few hundred of the cases have sufficient data to lend themselves to close analysis. With more data, I should be able to paint a fuller picture in the future.

The most sobering hypothesis that emerges from this data is that the enactment of the ADA may have greatly harmed plaintiffs' prospects under a related disability statute—the Rehabilitation Act of 1973. On the eve of the effective date of ADA Title I, Rehabilitation Act plaintiffs in employment discrimination cases were faring twice as successfully as would ADA plaintiffs over the next decade. This hypothesis will be the topic of my future consideration of the ADA.⁸⁰

⁸⁰ I will be exploring that possibility further in an ADA symposium at the University of Michigan Law School on November 3–4, 2000, and in my paper for that symposium. See Ruth Colker, *The Death of Section 504*, U. OF MICH. J.L. REFORM (forthcoming 2001).

APPENDIX

ADA CODING SHEET

CODER: _____ DATE : ____/____/____
(INITIALS) (MONTH, DAY, YEAR).

CASE ID: ____/____/____/____
(CIRCUIT ADA TITLE 4 CHAR - W,L,I)

CASE NAME: _____
(SHORT FORM)

SHORT SUMMARY

DECISION DATE: ____/____/____
(MONTH, DAY, YEAR)

APPEALS CT. CITATION:

(VOL - RPTR - PAGE)

DOCKET NO: ____ - ____

LOWER CT.

CITATION: _____
(VOL - RPTR - PAGE)

PUBLICATION

- (1) Published
(2) Unpublished
(3) Temp. Unpublished

OPINION

- (1) Signed
(2) Per curiam
(99) non-ascertainable

CROSS APPEAL

- (0) No
(1) Yes
(99) non-ascertainable

CLASS ACTION

- (0) No
(1) Yes
(99) non-ascertainable

CIRCUIT: _____

DISTRICT

- (1) Eastern
(2) Western
(3) Central
(4) Middle
(5) Southern
(6) Northern
(7) Entire State
(99) non-ascertainable

STATE: _____

DISTRICT JUDGE: _____
LAST, FIRST

MAGISTRATE

- (0) No
(1) Yes
(99) non-ascertainable

DISTRICT JUDGE CODE: _____

LOWER COURT DECISIONPRO-PLAINTIFF

- (1) Jury Verdict
(2) Bench Trial
(3) Prelim. Injunction
(4) Final Injunction
(5) Summary Judgment
(6) Denial of Sum. Judgment
(7) Denial of Dismissal
(8) J. as a Matter of Law
(9) Other/Arbitration
(99) non-ascertainable

PRO-DEFENDANT

- (11) Jury Verdict
(12) Bench Trial
(13) Prelim. Injunction
(14) Final Injunction
(15) Summary Judgment
(16) Denial of Sum. Judgment
(17) Dismissal
(18) J. as a Matter of Law
(19) Other/Arbitration
(99) non-ascertainable

STATUS AT COURT OF APPEALS

- (1) Decided by panel for first time
(2) Decided by panel after granting reconsideration
(3) Decided by panel after remand from Supreme Court.
(4) Decided by court en banc
(5) Decided by panel after remand to lower court
(99) non-ascertainable

LITIGANT INFORMATION

WHO INITIATED APPEAL

- (1) Original P
 (2) Original D
 (3) Federal Agency for P
 (4) Federal Agency for D
 (5) Intervenor
 (6) P and D (cross-appeal)
 (99) non-ascertainable

NUMBER OF DEFENDANTS

- | | |
|-----------------------|-------------------------------------|
| _____ Natural Persons | _____ Federal Government |
| _____ Businesses | _____ State or Sub-State Government |
| _____ Groups/Assoc. | _____ Fiduciaries |

TYPE OF DEFENDANTS

- (1) All Private
 (2) All Public
 (3) Both Private and Public

PLAINTIFF PRO SE

- (0) No
 (1) Yes
 (99) non-ascertainable

PLAINTIFF BLUE/WHITE COLLAR

- (1) Administrative
 (2) Technical
 (3) Clerical
 (4) Other white collar
 (5) Blue collar (includes supervisory blue)
 (6) Law enforcement/firefighter
 (99) unknown
 Job Title: _____

INTERVENORS

- (0) No/None
 (1) Yes, for Plaintiff
 (2) Yes, for Defendant
 (3) Both P and D
 (99) non-ascertainable

EEOC/DOJ A PARTY

- (0) No
 (1) Yes

EEOC/DOJ AMICUS

- (0) No
 (1) Yes

NUMBER OF AMICI: _____

GUIDANCE

EEOC REGULATIONS

- (0) Not Cited
 (1) Cited & Disregarded
 (2) Cited & Followed

EEOC GUIDANCE

- (0) Not Cited
 (1) Cited & Disregarded
 (2) Cited & Followed

MITIGATING MEASURES

- (0) Not Cited
 (1) Cited & Disregarded
 (2) Cited & Followed

COLL. BARGAINING

- (0) Not Cited
 (1) Cited & Disregarded
 (2) Cited & Followed

HEALTH INS. SUBTERFUGE

- (0) Not Cited
 (1) Cited & Disregarded
 (2) Cited & Followed

OTHER REGS/GUIDANCE CITED

- (0) No
 (1) Yes; _____

NON-ADA TREATMENT

ADEA (TRIAL)

- (0) No
 (1) Yes, Pro-P
 (2) Yes, Pro-D

ADEA (APPEAL)

- (0) No
 (1) Yes, Pro-P
 (2) Yes, Pro-D

TITLE VII (TRIAL)

- (0) No
 (1) Yes, Pro-P
 (2) Yes, Pro-D

TITLE VII (APPEAL)

- (0) No
 (1) Yes, Pro-P
 (2) Yes, Pro-D

ADA TITLE II
NON-EMPLOY
(TRIAL)

- (0) No
 (1) Yes, Pro-P
 (2) Yes, Pro-D

ADA TITLE II
NON-EMPLOY
(APPEAL)

- (0) No
 (1) Yes, Pro-P
 (2) Yes, Pro-D

ADA TITLE III (TRIAL)

- (0) No
 (1) Yes, Pro-P
 (2) Yes, Pro-D

ADA TITLE III
(APP)

- (0) No
 (1) Yes, Pro-P
 (2) Yes, Pro-D

OTHER NON-ADA CLAIM

- (0) No
 (1) Yes _____ STATE; FMLA; ERISA; 504

ADA TREATMENT

TREATMENT OF LOWER COURT'S ADA DECISION:

- (0) Stay, Petition or Motion Granted
- (1) Affirmed (includes affirmed and petition denied)
- (2) Reversed (includes reversed and vacated and remanded)
- (3) Petition Denied or Appeal Dismissed
- (4) Certification to Another Court
- (99) non-ascertainable

DAMAGE AWARD

DID DAMAGE AWARD CHANGE ON APPEAL?

- (0) No
- (1) Yes, lowered
- (2) Yes, reinstated or raised
- (3) not applicable; P Lost on appeal

AMOUNT AWARDED

Jury Amount: _____

District Court Amount: _____

Appeals Court Amount: _____

JUDICIAL INFORMATION

OPINION: (1) Signed; (2) Per Curiam; (99) non-ascertainable

<u>JUDGE 1 (AUTHOR)</u>	<u>JUDGE 2</u>	<u>JUDGE 3</u>
LAST, FIRST	LAST, FIRST	LAST, FIRST
JUDGE CODE: _____	JUDGE CODE: _____	JUDGE CODE: _____
MAJORITY/DISSENT/CONCUR (CIRCLE ONE)	MAJORITY/DISSENT/CONCUR (CIRCLE ONE)	MAJORITY/DISSENT/CONCUR (CIRCLE ONE)

NUMBER OF VOTES CAST

____ Majority ____ Concurrence ____ Dissent

**** IF SIGNED OPINION, THEN PUT THE AUTHOR OF THE OPINION INTO JUDGE 1**

ALLEGED IMPAIRMENTS

NAME OF IMPAIRMENT(S): _____

BLOOD DISORDERS (IB.) (9) _____ HIV/AIDS _____ Other Blood Disorders (anemia; sickle cell; lupus)	PSYCHIATRIC (IP.) (2) _____ Anxiety Disorder (phobias; obsessive-compulsive; PTS) _____ Depression	INDIVIDUAL (I.) _____ Chemical Sensitivities (15) _____ Cancer (not brain) (11)
EXTREMITIES (IE.) (4) _____ Missing Limbs/Digits _____ Hand/Arm/Shoulder (non-paralytic) _____ Foot/Leg/Knee/Hip (non-paralytic) _____ Other Ext. (arthritis, fibromyalgia, stiffness/weakness in joints)	_____ Manic Depressive Disorder (a/k/a bipolar) _____ Schizophrenia (psychosis) _____ Other Emotional/Psychiatrics	_____ Diabetes (6) _____ Disfigurement/Cosmetic (15) _____ Dwarfism (15)
NEUROLOGICAL (IN.) (3) _____ Autism _____ Brain/Head (trauma; tumors; accidents; stroke; loss of oxygen; Alzheimer's; meningitis) _____ Cerebral Palsy _____ Cumulative Trauma Disorder (carpal tunnel or soft tissue injury) _____ Epilepsy/Seizures _____ Learning Disability _____ Mental Retardation _____ Multiple Sclerosis _____ Paralysis (spinal cord injury, etc.) _____ Other Neurological (Parkinson's; sleep apnea; muscular dystrophy; migraines)	RESPIRATORY (IR.) (15) _____ Cystic Fibrosis _____ Tuberculosis _____ Other Respiratory (emphysema; acute bronchitis)	_____ Hearing Impairment (8) _____ Heart/Cardio (high blood pressure; hypertension) (5) _____ Hormone/Thyroid (15) _____ Obesity (15) _____ Reproductive (15)
	SUBSTANCE ABUSE (IS.) (7) _____ Alcoholism _____ Drug Addiction	_____ Skin Disorder (15) _____ Speech Impairment (15) _____ Visual Impairment (10)
	INTERNAL ORGANS (IO.) (15) _____ Gastrointestinal (stomach; intestines; ulcers) _____ Kidneys _____ Organs (liver, bladder, etc.)	MISCELLANEOUS (I.) _____ Disability Unknown (15) _____ Not Disabled (14) _____ Other: _____ (13)
	INDIVIDUAL (I.) _____ Allergies (15) _____ Asthma (12) _____ Back/Orthopedic (not a spinal cord injury) (1)	

ALLEGATIONS / ISSUES

(1) Pro-P; (2) Pro-D; (99) non-ascertainable

	<u>JUDGE 1</u>	<u>JUDGE 2</u>	<u>JUDGE 3</u>
____ Major Life Activity – Non-Work	____	____	____
____ Major Life Activity – Work	____	____	____
____ MLA unknown	____	____	____
____ P Actually Disabled	____	____	____
____ P Regarded as Disabled	____	____	____
____ Record of P's Disability	____	____	____
____ Association with Disabled Person (P need not be disabled)	____	____	____
____ Otherwise Qualified/Essential Functions	____	____	____
____ Reasonable Accommodation	____	____	____
____ Medical Exams (pre-employment or current)	____	____	____
____ Non-Medical Exams/Testing (typing test, etc.)	____	____	____
____ Terms and Conditions: Non-Monetary (change in work shift, etc.)	____	____	____
____ Terms and Conditions: Monetary (change in disability or pension benefits, health insurance, etc.)	____	____	____
____ Failure to Hire	____	____	____
____ Demotion	____	____	____
____ Failure to Promote	____	____	____
____ Failure to Reinstate	____	____	____
____ Harassment/Hostile Work Environment (pre-opposition)	____	____	____
____ Retaliation (post-opposition)	____	____	____
____ Suspension/Involuntary Leave (temporary; may be medical leave)	____	____	____
____ Discharge/Constructive Discharge	____	____	____
____ Arbitration	____	____	____
____ Direct threat to health or safety of others	____	____	____
____ No knowledge of disability	____	____	____
____ Judicial estoppel	____	____	____

